

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**CAUSE OF ACTION, INC.**

(formerly Freedom Through Justice Foundation)

2100 M Street N.W.

Suite #170-247

Washington, DC 20037-1233

Plaintiff,

v.

**NATIONAL ARCHIVES AND RECORDS  
ADMINISTRATION**

700 Pennsylvania Ave, NW

Washington, D.C. 20408

Defendant

**Case No.** \_\_\_\_\_

**Judge:** \_\_\_\_\_

**COMPLAINT**

Plaintiff Cause of Action, formerly Freedom Through Justice Foundation (“Plaintiff”) hereby files this complaint for compliance with the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (“FOIA”). As grounds therefore, Plaintiff respectfully alleges as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

It may grant declaratory relief pursuant to 28 U.S.C. § 2201, *et seq.* and award costs and attorneys’ fees pursuant to 28 U.S.C. § 2412 and 5 U.S.C. § 552(a)(4)(E).

2. Venue is proper pursuant to 28 U.S.C. § 1391(e)(1)(C) and 5 U.S.C. § 552(a)(4)(B).

**PARTIES**

3. Plaintiff Cause of Action (formerly known as “Freedom Through Justice Foundation”) (“CoA”), whose principal place of business is 2100 M Street N.W., Suite 170-247,

Washington, D.C. 20037, is a non-partisan, non-profit organization that uses public advocacy and legal reform strategies to ensure greater transparency in government and protect taxpayer interests and economic freedom. Plaintiff, who requested certain documents under FOIA, intends to disseminate the requested documents to its supporters and benefactors, government officials, appropriate news media, and to the American public at large. The documents Plaintiff seeks are likely to contribute significantly to the public's understanding of the operations and activities of the Financial Crisis Inquiry Commission ("FCIC") and National Archives and Records Administration ("NARA"). Plaintiff is empowered to undertake educational and other programs to promote and protect the public interest in connection with this and other matters.

4. Defendant, National Archives and Records Administration ("NARA"), is a 5 U.S.C. § 552(f)(1) "agency" and an instrumentality of the United States. NARA has possession, custody, and control of the records that are the subject of this Complaint, but has illegally denied CoA access to same.

### **FACTS**

5. Section 5 of the Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub. Law No. 111-21, § 5, 123 Stat. 1617, 1625-31 (2009) created the Financial Crisis Inquiry Commission ("FCIC") to report to Congress and the President its findings and conclusions on the causes of the U.S. financial and economic crisis.
6. FCIC was directed to advise the Attorney General of the United States of any person that may have violated federal law in connection with the financial crisis.
7. FERA did not exempt FCIC, or other agencies in possession or control of FCIC records, from compliance with the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA").

8. As authorized by 5 U.S.C. App. II § 4(b) of the Federal Advisory Committee Act (FACA), Section 5(g) of the FERA specifically exempts the FCIC from the disclosure requirements that the FACA—which only applies to bodies that, *inter alia*, advise the Executive branch per 5 U.S.C. App. II § 3(2)—would otherwise impose.
9. Section 5(b)(2)(B) of the FERA explicitly prohibited members of Congress and their employees from serving as members of the FCIC.
10. No members of Congress or their employees served on the FCIC.
11. FCIC's investigation included nineteen (19) days of public hearings and more than seven hundred (700) witness interviews.
12. On or around February 13, 2011, without any express Congressional authorization, the FCIC, on its own initiative, selectively released records including, e-mails, audio recordings and transcripts of interviews, and reports and fact sheets developed by FCIC staff— to Stanford Law School ostensibly for public distribution.
13. Although Section 5(h) of the FERA provided that the FCIC's report on the financial crisis was due on December 10, 2010, the FCIC did not deliver its statutorily mandated report to the President, Congress, and the public at large until January 27, 2011.
14. Pursuant to FERA, the FCIC terminated on February 13, 2011, without a successor in function.
15. On February 10, 2011, Phil Angelides, FCIC Chairman, sent a letter to Archivist of the United States, David Ferriero ("Letter"), stating his position that, with the sole exception of FCIC records that the Commission had previously selected to release to the public on its own initiative, NARA should impose a five-year categorical bar on public access to FCIC records, claiming that FCIC records are not subject to FOIA. (Exhibit 1).

16. Chairman Angelides's letter regarding the release of FCIC records did not reflect the views of one or more of the Commissioners on the FCIC; for example, Commissioner Peter Wallison believed that the public should have access to all FCIC documents except those records provided to the FCIC on condition of confidentiality. Wallison was not even aware of this Letter, which expresses a position materially inconsistent with his own views.
17. FCIC did not have either a legal obligation to transfer, or a regular, established practice of transferring its records to NARA. However, on or about February 11, 2011, FCIC entered into a Standard Form Agreement (using Standard Form 258) to Transfer Records to the National Archives of the United States (the "Agreement"), thereby transferring legal custody of FCIC records to Defendant from the FCIC. (Exhibit 2).
18. On information and belief, Sarah Zuckerman, whose signature appears on the "Agency Approval" portion of the Agreement and purportedly was authorized to execute the Agreement on behalf of the FCIC, was a low-level staff member on the FCIC on or about February 11, 2011.
19. In the Agreement, the certification by the "transferring agency" (FCIC) that "any constrictions on the use of these records are in conformance with the requirements of 5 U.S.C. § 552 [i.e. FOIA]," was crossed out by a hand-drawn line.
20. The Terms of Agreement section of the Agreement also provides that the transfer of FCIC records is in accordance with 44 U.S.C. § 2108.
21. The Terms of Agreement did not provide that the FCIC documents and communications were transferred to Defendant pursuant to 44 U.S.C. § 2118, which pertains to transfer of records from Congress and its committees.

22. The Terms of Agreement section of the Agreement provided that the transfer of FCIC records is in accordance with 44 U.S.C. § 2107(1), which, *inter alia*, authorizes Defendant to accept for deposit “the records of a Federal Agency,” so long as the Archivist of the United States believes it “to be in the public interest.”
23. On information and belief, Congress did not through letter, resolution, or any other expression of intent, provide instructions regarding NARA’s use and/or disclosure of the requested FCIC records.
24. On information and belief, the House Committee on Oversight and Government Reform (“Oversight Committee”) requested FCIC records, including e-mails, from FCIC in late 2010 and early 2011.
25. On information and belief, NARA produced many or all of the records requested by the Oversight Committee in an electronic format on electronic discs.
26. On information and belief, NARA’s production was not pursuant to a subpoena or any other form of legally-compelled disclosure.
27. On information and belief, the FCIC records produced to the Oversight Committee by NARA had been concatenated or otherwise assembled, organized, cataloged, or combined in a searchable format prior thereto.
28. On information and belief, certain of the FCIC records produced to the Oversight Committee by NARA were received in the form of database files, which were subsequently uploaded into Concordance, a form of discovery management software, by the Oversight Committee.
29. On information and belief, NARA has, at minimum, created database files of the FCIC records.

30. The FCIC website, as it existed on March 10, 2011, “is a federal record managed on behalf of” NARA that is publicly available at <http://cybercemetery.unt.edu/archive/fcic/20110310172443/http://fcic.gov/> (last visited March 5, 2012) that contains FCIC records under NARA’s custody and control.
31. On October 3, 2011, CoA, as Freedom Through Justice Foundation, sent a FOIA request to NARA for all FCIC records transferred to the Oversight Committee. CoA also asked for waiver of search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii). (Exhibit 3.)
32. By letter dated December 1, 2011, NARA designated Plaintiff’s October 3, 2011 FOIA request LL-12-143 and then denied it on grounds that FCIC records are not “agency records” that must be disclosed pursuant to FOIA’s disclosure provisions and that the FCIC established a five-year restriction on public access to FCIC records which it had chosen not to release. (Exhibit 4.)
33. By letter dated January 5, 2012, CoA timely appealed. (Exhibit 5.)
34. On or about January 13, 2012, NARA acknowledged receipt of CoA’s appeal. (Exhibit 6.) Final agency action denying the appeal occurred on or about February 6, 2012. (Exhibit 7.) NARA never addressed CoA’s request for waiver of search and duplication fees.
35. Both NARA’s December 1, 2011 FOIA denial letter and its February 6, 2012 appeal denial letter were silent as to Plaintiff’s request for a fee waiver.
36. On information and belief, many of the FCIC records transferred to Defendant on or about February 11, 2011, were not created by the FCIC but by Executive branch agencies and others.

37. On or about March 13, 2012, former FCIC Commissioner Peter Wallison wrote to NARA requesting access to FCIC records needed by him to respond to statements in a July 13, 2011 report by the minority staff of the Committee on Oversight and Government Reform, U.S. House of Representatives, that made use of FCIC materials from NARA.
38. On information and belief, NARA General Counsel Gary Stern told Wallison that “NARA’s policy is that any commissioner of any commission (including the Financial Crisis Inquiry Commission) has the right to review documents in case—among other things—the commissioner is called to testify in a legal or congressional proceeding.”
39. On information and belief, on or around March 29, 2012 Mr. Stern told Commissioner Wallison NARA would not allow Mr. Wallison to seek assistance from third parties (including counsel) to access FCIC records.
40. On information and belief, Mr. Stern also told Commissioner Wallison that NARA has the originals of all FCIC records, including records provided to the Oversight Committee.
41. By letter dated April 18, 2012, Mr. Stern responded to an April 5, 2012 email from Peter Wallison and stated:
- Only in the past few years have members of commissions requested that the Archivist of the United States allow for continued access by former commissioners and their senior staff. The request was premised on the limited need to prepare for possible subsequent congressional hearings or queries on the work of the commission. There is no statutory or regulatory requirement that the Archivist grant this request. However, the Archivist has determined that it is reasonable to grant former Commissioners and their senior staff continued access to the records of the Commission for the limited purpose described above. This discretionary access is limited to the persons named in the request letter from the former Chairman of the Commission, and thus does not extend to other persons, including representatives of the named persons.
42. On information and belief, Defendant has integrated the FCIC records into its files and record system in the legitimate conduct and course of its official duties.

**COUNT 1**

**FOR VIOLATION OF FOIA**

43. CoA repeats paragraphs 1 - 42.

44. CoA has exhausted applicable administrative remedies.

45. NARA's failure to disclose the documents requested by CoA violates FOIA, 5 U.S.C. § 552.

46. CoA is entitled to injunctive relief compelling the release and disclosure of the requested records.

**COUNT II**

**FOR A FEE WAIVER**

47. CoA repeats paragraphs 1-42.

48. CoA has exhausted applicable administrative remedies.

49. NARA's failure to grant CoA's request for a search and duplication fee waiver violates FOIA, 5 U.S.C. § 552.

**REQUESTED RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

- I. Enter an order:
  - a. Declaring that NARA has wrongfully withheld the requested FCIC records;
  - b. directing NARA to search for all records responsive to CoA's request and then demonstrate that it employed appropriate search methods;
  - c. directing NARA to produce by a date certain all non-exempt records and a Vaughn index of all records withheld under claim of exemption; and



- d. declaring that Plaintiff is entitled to a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(I) and 5 U.S.C. § 552(a)(4)(A)(iii).
- II. Issue a permanent injunction directing NARA to disclose and release to CoA all wrongfully withheld records.
- III. Maintain jurisdiction over this action until NARA complies with the FOIA and all orders of this Court.
- IV. Award CoA's attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E).
- V. Grant such additional and further relief to which CoA may be entitled.

Respectfully submitted,

s/ Karen M. Groen  
KAREN GROEN (D.C. Bar No. [501846])  
SENIOR OVERSIGHT COUNSEL  
Cause of Action, Inc.  
2100 M Street, NW  
Suite 170-247  
Washington, D.C. 20037-1233  
(202) 507-5880 (telephone)  
(202) 507-5881 (facsimile)

JS-44  
(Rev. 2/11 DC)

**CIVIL COVER SHEET**

<b>I (a) PLAINTIFFS</b> <div style="border: 1px dashed black; height: 40px; margin-top: 5px;"></div> <b>CAUSE OF ACTION</b> <div style="border: 1px dashed black; height: 40px; margin-top: 5px;"></div>	<b>DEFENDANTS</b> <div style="border: 1px dashed black; height: 40px; margin-top: 5px;"></div> <b>NATIONAL ARCHIVES AND RECORDS ADMINISTRATION</b> <div style="border: 1px dashed black; height: 40px; margin-top: 5px;"></div>
(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____ (EXCEPT IN U.S. PLAINTIFF CASES)	COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Karen M. Groen Cause of Action 2100 M Street, N.W., Suite 170-247 Washington, D.C. 20037 (202) 507-5880	ATTORNEYS (IF KNOWN) <div style="border: 1px dashed black; height: 60px; margin-top: 5px;"></div>

<b>II. BASIS OF JURISDICTION</b> (PLACE AN x IN ONE BOX ONLY) <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width:48%;"> <input type="radio"/> 1 U.S. Government Plaintiff                 </div> <div style="width:48%;"> <input type="radio"/> 3 Federal Question (U.S. Government Not a Party)                 </div> </div> <div style="display: flex; justify-content: space-between; margin-top: 10px;"> <div style="width:48%;"> <input checked="" type="radio"/> 2 U.S. Government Defendant                 </div> <div style="width:48%;"> <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)                 </div> </div>	<b>III CITIZENSHIP OF PRINCIPAL PARTIES</b> (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) <b>FOR DIVERSITY CASES ONLY!</b> <table style="width:100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
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**IV. CASE ASSIGNMENT AND NATURE OF SUIT**

(Place a X in one category, A-N, that best represents your cause of action and one in a corresponding Nature of Suit)

<input type="radio"/> <b>A. Antitrust</b>  <input type="checkbox"/> 410 Antitrust	<input type="radio"/> <b>B. Personal Injury/Malpractice</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> <b>C. Administrative Agency Review</b> <input type="checkbox"/> 151 Medicare Act <u>Social Security:</u> <input type="checkbox"/> 861 HIA ((1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g) <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> <b>D. Temporary Restraining Order/Preliminary Injunction</b>  Any nature of suit from any category may be selected for this category of case assignment.  *(If Antitrust, then A governs)*
<input type="radio"/> <b>E. General Civil (Other)</b> OR <input type="radio"/> <b>F. Pro Se General Civil</b>			
<u>Real Property</u> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property  <u>Personal Property</u> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157  <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition  <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark  <u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<u>Forfeiture/Penalty</u> <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other  <u>Other Statutes</u> <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 900 Appeal of fee determination under equal access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

<input type="radio"/> <b>G. Habeas Corpus/ 2255</b>  <input type="checkbox"/> 530 Habeas Corpus-General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee	<input type="radio"/> <b>H. Employment Discrimination</b>  <input type="checkbox"/> 442 Civil Rights-Employment (criteria: race, gender/sex, national origin, discrimination, disability age, religion, retaliation)  <i>*(If pro se, select this deck)*</i>	<input checked="" type="radio"/> <b>I. FOIA/PRIVACY ACT</b>  <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act)  <i>*(If pro se, select this deck)*</i>	<input type="radio"/> <b>J. Student Loan</b>  <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (excluding veterans)
<input type="radio"/> <b>K. Labor/ERISA (non-employment)</b>  <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> <b>L. Other Civil Rights (non-employment)</b>  <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 American w/Disabilities-Employment <input type="checkbox"/> 446 Americans w/Disabilities-Other	<input type="radio"/> <b>M. Contract</b>  <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> <b>N. Three-Judge Court</b>  <input type="checkbox"/> 441 Civil Rights-Voting (if Voting Rights Act)

**V. ORIGIN**

- ☒ 1 Original Proceeding  
 ☐ 2 Removed from State Court  
 ☐ 3 Remanded from Appellate Court  
 ☐ 4 Reinstated or Reopened  
 ☐ 5 Transferred from another district (specify)  
 ☐ 6 Multi district Litigation  
 ☐ 7 Appeal to District Judge from Mag. Judge

**VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)**

5 U.S.C. § 552: NARA has failed to produce records in response to CoA's FOIA request and did not address fee waiver request.

**VII. REQUESTED IN COMPLAINT**

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

JURY DEMAND:

Check YES only if demanded in complaint

YES

NO

☒**VIII. RELATED CASE(S) IF ANY**

(See instruction)

YES

☐

NO

☒

If yes, please complete related case form.

DATE 8-14-2012

SIGNATURE OF ATTORNEY OF RECORD

Kenn M. Green**INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44**

Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the Cover Sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff is resident of Washington, D.C.; 88888 if plaintiff is resident of the United States but not of Washington, D.C., and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of case.
- VI.** CAUSE OF ACTION: Cite the US Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASES, IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

**United States District Court  
For the District of Columbia**

CAUSE OF ACTION

vs

Plaintiff

Civil Action No. \_\_\_\_\_

NATIONAL ARCHIVES AND  
RECORDS ADMINISTRATION

Defendant

**CERTIFICATE RULE LCvR 7.1**

I, the undersigned, counsel of record for Cause of Action certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of Cause of Action which have any outstanding securities in the hands of the public:

None

These representations are made in order that judges of this court may determine the need for recusal.

Attorney of Record

Karen M. Groen  
Signature

D.C. Bar No. 501846

BAR IDENTIFICATION NO.

Karen M. Groen

Print Name

2100 M Street, N.W., Suite 170-247

Address

Washington, D.C. 20037

City

State

Zip Code

(202) 507-5880

Phone Number

AO 440 (Rev. 12/09; DC 03/10) Summons in a Civil Action

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UNITED STATES DISTRICT COURT

for the

\_\_\_\_\_ District of \_\_\_\_\_

\_\_\_\_\_  
*Plaintiff*

v.

\_\_\_\_\_  
*Defendant*

)  
)  
)  
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)  
)  
)

Civil Action No. \_\_\_\_\_

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

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UNITED STATES DISTRICT COURT

for the

\_\_\_\_\_ District of \_\_\_\_\_

\_\_\_\_\_  
*Plaintiff*

v.

\_\_\_\_\_  
*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No.

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:



AO 440 (Rev. 12/09; DC 03/10) Summons in a Civil Action

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UNITED STATES DISTRICT COURT

for the

\_\_\_\_\_ District of \_\_\_\_\_

\_\_\_\_\_  
*Plaintiff*

v.

\_\_\_\_\_  
*Defendant*

)  
)  
)  
)  
)  
)  
)

Civil Action No.

**SUMMONS IN A CIVIL ACTION**

To: *(Defendant's name and address)*

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

*ANGELA D. CAESAR, CLERK OF COURT*

Date: \_\_\_\_\_

\_\_\_\_\_  
*Signature of Clerk or Deputy Clerk*

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
 was received by me on *(date)* \_\_\_\_\_.

☐ I personally served the summons on the individual at *(place)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
 \_\_\_\_\_, a person of suitable age and discretion who resides there,  
 on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* \_\_\_\_\_, who is  
 designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
 \_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the summons unexecuted because \_\_\_\_\_; or

☐ Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

# EXHIBIT

1



The Honorable David Ferriero  
Archivist of the United States  
National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740

Dear Mr. Ferriero:

Phil Angelides  
*Chairman*

Hon. Bill Thomas  
*Vice Chairman*

Brooksley Born  
*Commissioner*

Byron S. Georgiou  
*Commissioner*

Senator Bob Graham  
*Commissioner*

Keith Hennessey  
*Commissioner*

Douglas Holtz-Eakin  
*Commissioner*

Heather H. Murren, CFA  
*Commissioner*

John W. Thompson  
*Commissioner*

Peter Wallison  
*Commissioner*

Wendy Edelberg  
*Executive Director*

When the Financial Crisis Inquiry Commission (the "Commission") terminates, by statute, on February 13, 2011, the records of the Commission will be transferred to the National Archives and Records Administration (NARA) for preservation and public access. This letter sets forth the Commission's continued interest in government and public access to information created or gathered during its investigation and establishes criteria under which these records should be made available.

The Commission has established a policy of making available to the public as much information as possible, while safeguarding personal privacy, law enforcement, private commercial, financial regulatory, and other sensitive information. The Commission's final report is highly detailed and discloses a significant amount of previously unavailable material. In addition, the Commission has released through its website many supplemental documents, including staff memoranda, documentary evidence, e-mails, witness statements, interviews, transcripts and summaries, audio and video files, and press releases. All of the records and information that the Commission has made available to the public should continue to be made publicly available by NARA. This includes the records that are accessible on the Commission's website, which NARA will maintain after February 13, 2011, and on the Commission's parallel website which the Commission will establish at Stanford University. Because the Commission was established in the legislative branch, its records have not been subject to the Freedom of Information Act (FOIA), and we understand that the FOIA will not apply to Commission records even after they are transferred to NARA.

The Commission recommends to NARA that records not already publicly available should be made available to the public, to the greatest extent possible consistent with the terms of this letter, beginning on February 13, 2016. The Commission encourages NARA to conduct a systematic review of the records that are not currently available to the public with the goal of releasing to the public as much information as is allowable by law and regulation on February 13, 2016, or as soon thereafter as possible. Records should not be disclosed immediately after February 13, 2016, if they contain (a) personal privacy information that the Commission agreed to protect from public disclosure for longer than 5 years; (b) confidential financial supervisory or regulatory information which remains sensitive at the time of release; (c) proprietary business information which remains confidential or contains trade secrets at the time of release, including any such information that the Commission has agreed will remain confidential for a longer period of time; or (d) information which is otherwise barred from public disclosure by law, as determined by the Archivist.

We understand that there will be an initial period of at least several months during which NARA's staff will be organizing and processing the Commission's records. During this period, access to the records should be provided to the ten members of the Commission (Phil Angelides, the Honorable Bill Thomas, Brooksley Born, Byron S. Georgiou, Senator Bob Graham, Keith Hennessey, Douglas Holtz-Eakin, Heather H. Murren, John W. Thompson and Peter J. Wallison) and the following members of the Commission staff and advisors: Wendy Edelberg, Peter Kadzik, Esq., Gretchen Newsom, Scott Ganz, Gary Cohen, Greg Feldberg, Chris Seefer, Maryann Haggerty, and Cassidy Waskowicz. In addition, certain administrative staff of the Commission may have access as part of their duties to transfer the records to NARA. During the period when the FCIC transfers records to NARA and after February 13, 2011, it is important that the ten Commissioners and the designated members of the Commission staff and advisors have continuing access to the Commission's records once the records are transferred to NARA.

Thank you for your cooperation in carrying out the important task of preserving and providing access to the Commission's voluminous records.

Very truly yours,

  
Phil Angelides  
Chairman

Financial Crisis Inquiry Commission

Cc: Members, Financial Crisis Inquiry Commission  
Gary M. Stern, NARA  
Wendy Edelberg, Executive Director  
Cassidy Waskowicz, Deputy General Counsel

# EXHIBIT

2

# AGREEMENT TO TRANSFER RECORDS TO THE NATIONAL ARCHIVES OF THE UNITED STATES

1. INTERIM CONTROL NO. (NARA Use Only)

## TERMS OF AGREEMENT

The records described below and on the attached pages are deposited in the National Archives of the United States in accordance with 44 U.S.C. 2107. ~~The transferring agency certifies that any restrictions on the use of these records are in conformance with the requirements of 5 U.S.C. 552.~~

In accordance with 44 U.S.C. 2108, custody of these records becomes the responsibility of the Archivist of the United States at the time of transfer of the records. It is agreed that these records will be administered in accordance with the provisions of 44 U.S.C. Chapter 21, 36 CFR XII, 36 CFR Part 1256, and such other rules and regulations as may be prescribed by the Archivist of the United States (The Archivist). Unless specified and justified below, no restrictions of the use of these records will be imposed other than the general and specific:

restrictions on the use of these records will be imposed other than the general and specific restrictions on the use of records in the National Archives of the United States that have been published in 36 CFR Part 1256 or in the Guide to the National Archives of the United States. The Archivist may destroy, donate, or otherwise dispose of any containers, duplicate copies, unused forms, blank stationery, nonarchival printed or processed material, or other non-record material in any manner authorized by law or regulation. Without further consent, the Archivist may destroy deteriorating or damaged documents after they have copied in a form that retains all of the information in the original document. The Archivist will use the General Records Schedule and any applicable records disposition schedule (SF 115) of the transferring agency to dispose of nonarchival materials contained in this deposit.

### 2A. AGENCY APPROVAL

Signature

Date

### 3A. NARA APPROVAL

Signature

Date

### 2B. NAME, TITLE, MAILING ADDRESS

Sarah Zuckerman  
Financial Crisis Inquiry Commission  
1717 Pennsylvania Ave, NW  
Washington, DC 20006

### 3B. NAME, TITLE, MAILING ADDRESS

Matt Fulgham  
Assistant Director, Center for Legislative Archives (NARA)  
700 Pennsylvania Ave, NW  
Washington, DC 20408

## RECORDS INFORMATION

### 4A. RECORDS SERIES TITLE Records of the Financial Crisis Inquiry Commission

### 4B. DATE SPAN OF SERIES 2009-2011 (Attach any additional description)

### 5A. AGENCY OR ESTABLISHMENT

Legislative branch commission

### 5B. AGENCY MAJOR SUBDIVISION

### 5C. AGENCY MINOR SUBDIVISION

### 5D. UNIT THAT CREATED RECORDS

### 5E. AGENCY PERSON WITH WHOM TO CONFER ABOUT THE RECORDS

Name: Sarah Zuckerman  
Telephone Number: 202-292-1388

### 6. DISPOSITION AUTHORITY

pending records schedule (NN1-148- )

### 7. IS SECURITY CLASSIFIED INFORMATION PRESENT? ☒ NO ☐ YES

LEVEL: ☐ Confidential ☐ Secret ☐ Top Secret

SPECIAL MARKINGS: ☐ (R) (U) ☐ SCI ☐ NATO

INFORMATION STATUS: ☐ Other ☐ Segregated ☐ Declassified

### 8. CURRENT LOCATION OF RECORDS

☒ Agency (Complete 8A only)  
☐ Federal Records Center (Complete 8B only)

### 8A. ADDRESS:

1717 Pennsylvania Ave, NW  
Washington, DC 20006

### 9. PHYSICAL FORMS

☒ Paper Documents ☐ Posters  
☒ Paper Publications ☐ Maps and Charts  
☐ Microfilm/Microfiche ☐ Archiving Drawings  
☒ Electronic Records ☐ Motion/Sound/Video  
☐ Photographs ☐ Other (specify):

### 10. VOLUME CONTAINERS:

Cu. Ft.: 243 Number: 243 Type: FRC

### 11. DATE RECORDS ELIGIBLE FOR TRANSFER TO THE ARCHIVES

Feb. 2011

### 12. ARE RECORDS FULLY AVAILABLE FOR PUBLIC USE?

☐ YES ☒ NO (If no, attach limits on use and justification)

### 13. ARE RECORDS SUBJECT TO THE PRIVACY ACT?

☐ YES ☒ NO

(If yes, cite Agency System Number and Federal Register volume and page number of most recent notice and attach a copy of this notice.)

### 14. ATTACHMENTS

☐ Agency Manual Excerpt ☐ Listing of Records Transferred  
☐ Additional Description ☐ NA Form 14097 or Equivalent  
☐ Privacy Act Notice ☐ Microform Inspection Report  
☒ Other (specify): Access letter ☐ SF(s) 135

### 8B. FRC ACCESSION NUMBER

### CONTAINER NUMBERS

### FRC LOCATION

## NARA PROVIDES

### 5. SHIPPING INSTRUCTIONS TO AGENCIES/REMARKS REGARDING DISPOSITION

RG 148

### 6. RECORDS ACCEPTED INTO THE NATIONAL ARCHIVES OF THE UNITED STATES

Signature

Date

### 17. NATIONAL ARCHIVES ACCESSION NO.

NAV3-148-11-001

# EXHIBIT

3





2111 Wilson Blvd # 700 | Arlington, VA, 22201 | 703.875.8625

**VIA E-MAIL AND FIRST CLASS MAIL**

Mr. Gary M. Stern  
General Counsel  
National Archives and Records Administration  
8601 Adelphi Road, Room 3110  
College Park, MD 20740  
[garym.stern@nara.gov](mailto:garym.stern@nara.gov)

**Re: Freedom of Information Act Request**

Dear Mr. Stern:

We write on behalf of the Freedom Through Justice Foundation, a 501(c)(3) nonprofit, nonpartisan public interest firm that uses public policy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests, and promote social and economic freedoms.

The Financial Crisis Inquiry Commission ("FCIC") was created by an act of Congress in May of 2009, and was tasked with investigating and completing a report that detailed the causes of the economic failures in 2008. Despite the FCIC's nonpartisan purpose, both the FCIC and its subsequent report have been the subject of recent political controversy.

Prior to the release of the Commission's report, U.S. House Committee on Oversight and Government Reform Chairman Darrell Issa (R-CA) raised questions concerning the potential conflicts of interest that existed between Commission staff and several outside entities involved in suing banks targeted by the FCIC.<sup>1</sup> Oversight Committee Ranking Member Elijah Cummings (D-MD) recently released a report finding that several of the decisions of the FCIC may have been politically motivated.<sup>2</sup>

Because of the risk of potential conflicts of interest and politicization involved at the FCIC, the public has an interest in an independent assessment of the FCIC record.

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<sup>1</sup> LETTER, DARRELL ISSA, CHRMN., H. COMM. ON OVERSIGHT & GOV'T REF. TO PHIL ANGELIDES, CHRMN., FCIC (July 27, 2010), *available at* [http://oversight.house.gov/images/stories/Letters/7-27-10\\_Issa\\_Letter\\_to\\_Angelides\\_-\\_FCIC\\_Budget.pdf](http://oversight.house.gov/images/stories/Letters/7-27-10_Issa_Letter_to_Angelides_-_FCIC_Budget.pdf).

<sup>2</sup> STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REF., 111TH CONG., AN EXAMINATION OF ATTACKS AGAINST THE FINANCIAL CRISIS INQUIRY COMMISSION 3 (Comm. Print 2011) *available at* <http://democrats.oversight.house.gov/images/stories/MINORITY/fcic%20report/FCIC%20Report%2007-13-11.pdf>.

Mr. Gary M. Stern  
October 3, 2011  
Page 2 of 4

FCIC records were deposited at the National Archives ("NARA,"<sup>3</sup>) which subsequently shared those documents with the Oversight and Government Committee for the purpose of the Committee's investigation. Freedom Through Justice Foundation is entitled to receive the aforementioned records stored with NARA and shared with the Oversight Committee. NARA is a federal agency and records under its control are subject to disclosure under FOIA.

This request seeks no privileged information from NARA. These records are not exempt from disclosure due to privilege because they were relied upon extensively in the creation of the House Oversight and Government Reform Committee's publicly released report. And even if these records were privileged under FOIA exemption 5, which protects inter-agency or intra agency memoranda, documents lose their protection if a final decision maker chooses "expressly to adopt or incorporate" the documents by reference.<sup>4</sup>

Other privileges or exemptions that might prevent disclosure are not applicable here. Congress does not enjoy the same protections as a federal agency under FOIA, and documents conveyed to Congress do not fall under the inter-agency protections.<sup>5</sup> Moreover, the documents were requested by the Chairman of the House Oversight and Government Reform Committee via his subpoena powers, so the privileges that normally apply to materials requested by individual members of Congress should not apply.<sup>6</sup> The Oversight Committee's public report has revealed the contents of the FCIC documents to the public, and it is in the public's best interests to have access to the entire record. Additionally, any deliberative-process or informational-privilege claims against this request can only be raised by the FCIC, which has expressed its intent that this information eventually be made public through NARA.<sup>7</sup>

Pursuant to the provisions of FOIA and 5 CFR § 2502, the Freedom Through Justice Foundation hereby requests that NARA produce within twenty (20) business days for the date range of May 20, 2009 to the present: all documents, including e-mail communications, memoranda, draft reports, and other relevant information and/or data contained in the records transfer of Financial Crisis Inquiry Commission documents stored at NARA to the Committee on Oversight and Government Reform at the U.S. House of Representatives.

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<sup>3</sup> Interview by FTJ Staff with Gary Stern, General Counsel, FCIC (Sept. 23, 2011).

<sup>4</sup> See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1975) *see also* Niemeier v. Watergate Special Protection Force, 565 F.2d 967, 973 (7th Cir. 1977) (ordering disclosure of underlying memorandum that was expressly relied upon in final agency dispositional document).

<sup>5</sup> See Dow Jones & Co. v. DOJ, 917 F.2d 571 (D.C. Cir. 1990).

<sup>6</sup> Cf. Murphy v. Department of Army, 613 F.2d 1151 (D.C. Cir. 1979).

<sup>7</sup> FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT, XII, (2011), *available at* <http://www.gpoaccess.gov/fcic/fcic.pdf> (The report is not a sole repository of what the panel found . . . more materials that cannot be released yet for various reasons will eventually be made public through the National Archives and Records Administration).



Mr. Gary M. Stern  
October 3, 2011  
Page 3 of 4

**Freedom Through Justice Qualifies Under the Non-Commercial Fee Category**

The Freedom Through Justice Foundation requests a waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 5 U.S.C. § 552(a)(4)(A)(iii). The Freedom Through Justice Foundation is a 501(c)(3), not-for-profit, representative of the news media and has no commercial purpose in requesting information. Freedom Through Justice has no commercial, trade or profit interests and is organized and operated to publish or broadcast news to the general public. Freedom Through Justice will use its editorial skills to turn raw materials into a distinct work.

**Freedom Through Justice Is Entitled to a Complete Waiver of Fees**

Freedom Through Justice requests a waiver of fees as a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II). The disclosure of the requested information is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).<sup>8</sup>

The subject matter of the requested records specifically concerns identifiable "operations or activities of the government." The disclosable portions of the requested information will be meaningfully informative in relation to this request. This disclosure will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Freedom Through Justice has a dynamic and diverse staff whose range of expertise includes a combined 15 years of government oversight, investigative reporting, and federal public interest litigation experience.

**Production of Documents and Contact Information**

We call your attention to President Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA. . . . The presumption of disclosure should be applied to all decisions involving FOIA.<sup>9</sup>

If any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the

<sup>8</sup> See, e.g., *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 814 n.3 (2d Cir. 1994); *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 27 n.5 (D.D.C. 2006).

<sup>9</sup> PRESIDENT BARACK OBAMA, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, SUBJECT: FREEDOM OF INFORMATION ACT, Jan. 21, 2009, available at <http://www.whitehouse.gov/the-press-office/freedom-information-act>.

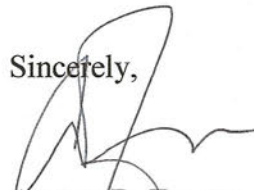
Mr. Gary M. Stern  
October 3, 2011  
Page 4 of 4

claimed exemption.<sup>10</sup> In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material.<sup>11</sup>

In an effort to facilitate record production within the statutory time limit, the Freedom Through Justice Foundation prefers to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, the Freedom Through Justice Foundation will accept the "rolling production" of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification of this request or any portion thereof, please contact us immediately via Amber Taylor (Amber.Taylor@ftjfoundation.org) or Will Hild (Will.Hild@ftjfoundation.org) at 703-875-8625. We look forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,



AMBER D. TAYLOR  
SENIOR ATTORNEY

Encl. "Responding to Records Requests" and "Definitions" for the purposes of this request

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<sup>10</sup> Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

<sup>11</sup> 5 U.S.C. § 552(b).



### **Responding to Document Requests**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Freedom Through Justice Foundation.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Freedom Through Justice Foundation's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. When you produce documents, you should identify the paragraph in the Freedom Through Justice Foundation's request to which the documents respond.
5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
6. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Freedom Through Justice Foundation staff to determine the appropriate format in which to produce the information.
7. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
8. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
9. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

10. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
11. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
12. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
13. All documents shall be Bates-stamped sequentially and produced sequentially.

#### **Definitions**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmation, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.



3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

# EXHIBIT

4





# National Archives and Records Administration

700 Pennsylvania Avenue, NW  
Washington, DC 20408-0001

December 1, 2011

Amber D. Taylor  
Senior Counsel  
Freedom Through Justice Foundation  
2111 Wilson Blvd, #700  
Arlington, VA 22201

Dear Ms. Taylor:

This is in response to your letter of October 3, 2011, to NARA General Counsel Gary M. Stern, which requests the records of the Financial Crisis Inquiry Commission (FCIC) that were transferred by the National Archives and Records Administration (NARA) to the House Committee on Oversight and Government Reform. Mr. Stern referred your request to the Center for Legislative Archives, as we are the archival custodian of the FCIC records. We apologize for the delay in responding to your request.

As you may be aware, the FCIC was a commission that was established within the legislative branch. As such, its records are not subject to the Freedom of Information Act (FOIA), which only applies to executive branch agencies. While NARA is an executive branch agency, we serve as the National Archives for all three branches of the Government in accordance with the Federal Records Act (FRA), 44 U.S.C. Chapters 21, 29, 31, and 33. When federal agencies from the legislative and judicial branches accession their permanent federal records into the National Archives of the United States, those records do not become "agency records" subject to the FOIA. However, they will become available for public access requests under the FRA.

The FCIC records were transferred to NARA on February 11, 2011, and, in accordance with 44 U.S.C. § 2108(a), the Commission established a five-year restriction on public access to its non-public records. Accordingly, NARA will not accept requests for public access until February 11, 2016. Your letter notes that NARA has provided some of the FCIC records to the House Committee on Oversight and Government Reform. NARA did so in response to a formal request from the Committee as part of its ongoing business. It is well established that the provision of records to the Congress does not constitute a public release of that information (see, e.g., *Murphy v. Dep't of Army*, 613 F.2d 1151, 1155 (D.C. Cir. 1979)). The fact that Congress may have subsequently released some of these records to the public does not alter the non-public status of these records at NARA.

Accordingly, we are denying your request because these records are not subject to the FOIA. If you are not satisfied with our action on this request, you have the right to file an administrative appeal. Address your appeal to:

Deputy Archivist (ND)  
National Archives and Records Administration  
College Park, Maryland 20740

Your appeal should be received within 35 calendar days of the date of this letter and it should explain why you think this response does not meet the requirements of the FOIA. All correspondence should reference the tracking number LL-12-143.

Sincerely,

A handwritten signature in dark ink, appearing to read 'M. Fulgham', with a stylized flourish at the end.

MATT FULGHAM  
Assistant Director  
Center for Legislative Archives

# EXHIBIT

5



**Advocates for Government Accountability**

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A 501(c)(3) NONPROFIT CORPORATION

---

TELEPHONE: (703) 875.8625  
WEB SITE: CAUSEOFACTION.ORG  
2100 M STREET  
SUITE 170-247  
WASHINGTON, D.C. 20037

January 5, 2012

**VIA E-MAIL AND FIRST CLASS MAIL**

ATTN: Debra Steidel Wall  
Deputy Archivist of the United States  
FOIA Appeal Staff, Room 4200  
National Archives and Records Administration  
8601 Adelphi Road  
College Park, Maryland 20740-6001

**RE: FREEDOM OF INFORMATION ACT APPEAL (FOIA APPEAL LL-12-143)**

Dear Mr. Fulgram:

We write in response to your December 1, 2011 letter denying our Freedom of Information Act ("FOIA") request for records created, relied on, or otherwise used by the Financial Crisis Inquiry Commission (hereinafter "FCIC") pursuant to Section 5 of the Fraud Enforcement and Recovery Act of 2009 (hereinafter "FERA") and subsequently obtained and controlled by the National Archives and Records Administration (hereinafter "NARA"). Specifically, you denied our request on the following grounds: (1) the FCIC is not subject to FOIA because FOIA "only applies to executive branch agencies"; and (2) "in accordance with 44 U.S.C. § 2108(a), the Commission established a five-year restriction on public access to its non-public records."<sup>1</sup> For the following reasons, we urge you to reevaluate your position.

**A. FCIC records obtained and controlled by NARA are subject to FOIA and must be produced, unless a narrowly construed statutory exemption applies.**

NARA has acknowledged it is an executive branch agency, which is generally subject to FOIA. The Supreme Court has made clear that "[a]n agency ordinarily may refuse to make

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<sup>1</sup> Letter from Matt Fulgham, Assistant Director, Center for Legislative Archives, to Amber Taylor, Cause of Action (Dec. 1, 2011).

Mr. Matt Fulgrum

January 5, 2012

Page 2

available documents in its control only if it proves that the documents fall within one of the nine disclosure exemptions set forth in § 552(b).”<sup>2</sup>

As you are aware, FOIA does not define the term “agency records.” But the Court has established a two-pronged test for determining whether material constitutes an “agency record.”<sup>3</sup> The first prong of the test is disjunctive: a federal agency must “*either create or obtain*” the materials at issue.<sup>4</sup> Under this requirement, the agency must have possession of the material at the time of the request in order for the material to qualify as an “agency record.” Second, the agency “must be in control of the requested materials at the time the FOIA request is made[,]. . .mean[ing] that the materials have come into the agency’s possession in the legitimate conduct of its official duties.”<sup>5</sup> In *Department of Justice v. Tax Analysts*, the Court applied this test and squarely held that federal district court tax opinions in the possession of the Tax Division of the Department of Justice are not *court* records, which are outside of the ambit of FOIA, but rather “agency records,” which *are* subject to FOIA.<sup>6</sup>

The Court has given its imprimatur to a broad definition of “agency records”: “agency records include all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business....”<sup>7</sup>

Your agency, which is subject to FOIA, has possession and control of FCIC documents that are agency records under well-established law. The mere fact that those agency records were produced by a Commission formed pursuant to a federal statute that directed that Commission to report *both* to the President and Attorney General and the Congress does not somehow *ipse dixit* transform FCIC documents into part of the Congressional Record.<sup>8</sup> Rather, the FCIC documents in your possession constitute “agency records” that your federal agency has obtained and currently has in its control. Those agency records must be produced in response to a FOIA request, unless one of FOIA’s nine exemptions applies. And as the case cited by you in your

<sup>2</sup> *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 141 (1989).

<sup>3</sup> *See id.* at 138, 155.

<sup>4</sup> *Id.* at 144 (citations omitted and emphasis added).

<sup>5</sup> *Id.* at 145.

<sup>6</sup> *See id.*

<sup>7</sup> *Id.* (internal quotations and citation omitted).

<sup>8</sup> *Cf. United We Stand Am., Inc. v. IRS*, 360 U.S. App. D.C. 243, 251 (D.C. Cir. 2004) (“Under these circumstances, absent ‘clear’ (Goland’s word) expression of congressional intent to control the entire response, neither the IRS’s own expectations nor its handling of the document can turn the entire agency-created record into a congressional document. Otherwise, documents that agencies create in response to congressional requests could become congressional documents even if Congress expressed no intent to keep them secret, for it can be said of most such materials that they would not have been created but for the congressional request, that the agency relies on them for no other purpose, and that they are kept in separate files, i.e., in the agency’s office of congressional affairs. Such a result would ‘exempt from FOIA’s purview a broad array of materials otherwise clearly categorizable as agency records, thereby undermining the spirit of broad disclosure that animates the Act.’ ” (citations omitted)). *See generally* Fraud Enforcement and Recovery Act of 2009, Pub. Law 111-21, 123 Stat. 1617, Sec. 5 (creating Financial Crisis Inquiry Commission).



Mr. Matt Fulgrum  
January 5, 2012  
Page 3

letter makes clear: “as a matter of public policy, the FOIA exemptions are to be narrowly construed....”<sup>9</sup>

**B. The Commission is not authorized under 44 U.S.C. § 2108(a) to establish a five-year restriction on public access to FCIC records.**

5 U.S.C. § 552(b)(3) provides in relevant part that FOIA does not apply to agency records that are

specifically exempted from disclosure by statute (other than section 552b of this title [5 USCS § 552b]), if that statute—

(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009 [enacted Oct. 28, 2009], specifically cites to this paragraph.<sup>10</sup>

Conspicuously absent from Section 5 of FERA, which created the FCIC, is any blanket statement to the effect that the Commission’s work product and the documents it generated and relied on should, as a general matter, be withheld from the public in such a manner as to leave no discretion on the issue, and the statute does not outline any criteria for withholding information. Indeed, FERA contains no provisions that implicitly or explicitly indicate a congressional intent to exempt the FCIC from FOIA.

To be sure, Section 5(g) of the Act, entitled “Nonapplicability of Federal Advisory Committee Act,” specifically states that “[t]he Federal Advisor Committee Act (5 U.S.C. App.) shall not apply to the Commission.”<sup>11</sup> But application of the well-accepted principle of statutory construction *inclusio unius exclusio alterius*, the inclusion of one thing suggests the exclusion of another, militates toward the conclusion that Congress did not intend to exempt the Commission’s work from disclosure under FOIA. Moreover, the Commission held public hearings and generated a public report. The notion that Congress intended to either exempt FCIC from FOIA or implicitly delegate to the Commission the authority to restrict access to the documents it relied on and generated is without any statutory support.

You invoke 44 U.S.C. § 2108(a) to support your assertion that there is a “five-year restriction on public access to [FCIC’s] non-public records.” That provision provides in relevant part:

Except as provided in subsection (b) of this section, when the head of a Federal agency states, in writing, restrictions that appear to him to be necessary or desirable in the public interest with respect to the use or

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<sup>9</sup> *Murphy v. Dep’t. of Army*, 613 F.2d 1151, 1157-1158 (D.C. Cir. 1979).

<sup>10</sup> 5 U.S.C. § 552(b)(3).

<sup>11</sup> Pub. Law 111-21, 123 Stat. 1617, Sec. 5(g).

Mr. Matt Fulgrum  
January 5, 2012  
Page 4

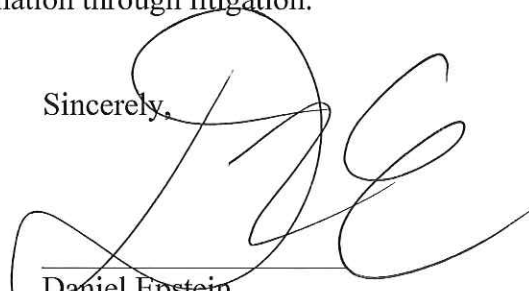
examination of records being considered for transfer from his custody to the Archivist, the Archivist shall, if he concurs,[,] impose such restrictions on the records so transferred, and may not relax or remove such restrictions without the written concurrence of the head of the agency from which the material was transferred, or of his successor in function, if any. ....Restriction on the use or examination of records deposited with the National Archives of the United States imposed by section 3 of the National Archives Act, approved June 19, 1934, shall continue in force regardless of the expiration of the tenure of office of the official who imposed them but may be removed or relaxed by the Archivist with the concurrence in writing of the head of the agency from which material was transferred or of his successor in function, if any.<sup>12</sup>

That provision gives neither NARA nor the Commission the authority to impose a five-year restriction on FOIA access. First, as you noted, the FCIC is not a federal agency; thus, it cannot have a "head." Second, 5 U.S.C. § 552(b)(3), by its terms, only applies to statutes—not regulations promulgated by agencies or agency orders. Thus, NARA and other agencies may not insulate themselves from FOIA simply by promulgating regulations. Therefore, 44 U.S.C. § 2108(a) is inapposite to the question whether the FCIC records are subject to FOIA.

Simply put, the documents we requested in our initial FOIA request are agency records that are *subject to* FOIA. Unless you can point to a specific provision in the FOIA statute that exempts individual records, you must provide them in response to our FOIA request.

We specifically reserve the right to supplement this appeal as necessary and as allowed by applicable law. We sincerely hope that you will reconsider your agency's denial of our FOIA request in light of this additional information. If you do not, we will have no choice but to vindicate our right of access to this information through litigation.

Sincerely,



Daniel Epstein  
Executive Director

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<sup>12</sup> 44 U.S.C. § 2108(a).

# EXHIBIT

6





E-MAILED JAN 13 2012

January 10, 2012

Daniel Epstein  
Cause of Action  
2100 M Street  
Suite 170-247  
Washington, DC 20037

Re: Freedom of Information Act Appeal NGC12-012A

Dear Mr. Epstein:

This is in response to your Freedom of Information Act (FOIA) appeal of January 5, 2012, regarding access to the records of the Financial Crisis Inquiry Commission (FCIC) in the custody of the National Archives and Records Administration (NARA). Your appeal was received in this office on January 5, 2012 and was given the case number **NGC12-012A**.

If you wish to know the status of your request please feel free to contact me directly. I may be reached by phone at (301) 837-0583 or by e-mail at [joseph.scanlon@nara.gov](mailto:joseph.scanlon@nara.gov).

Sincerely,



JOSEPH A. SCANLON  
NARA FOIA Officer  
Office of General Counsel

NATIONAL ARCHIVES *and*  
RECORDS ADMINISTRATION

8601 ADELPHI ROAD  
COLLEGE PARK, MD 20740-6001  
[www.archives.gov](http://www.archives.gov)

# EXHIBIT

*7*



February 6, 2012

Daniel Epstein  
Executive Director  
Cause of Action  
2100 M Street Suite 170-247  
Washington, D.C. 20037

Re: Freedom of Information Act Appeal NGC12-012A

Dear Mr. Epstein:

This is in response to your Freedom of Information Act (FOIA) appeal of January 5, 2012. In the original request received from Amber Taylor, dated October 3, 2011, you asked for access to the records of the Financial Crisis Inquiry Commission (FCIC or Commission) that were transferred to the National Archives and Records Administration (NARA) from the House Committee on Oversight and Government Reform. In our initial response of December 1, 2011, you were advised that in our view the records of the FCIC do not qualify as “agency records” for purposes of the Freedom of Information Act, as they were transferred into NARA’s custody from the Legislative branch of government. You were further informed that the Commission established a five-year restriction on public access to its non-public records, and that NARA will not accept requests for public access until February 11, 2016.

In your appeal, you argue that NARA has possession and control of the documents within the meaning of FOIA law, and therefore that FCIC’s records now enjoy “agency record” status, citing to *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), and related case law. Your appeal makes a secondary argument taking issue with NARA’s invocation of 44 U.S.C. 2108(a) in support of applying access restrictions. In your view, section 2108 of the Federal Records Act, constitutes insufficient authority for FCIC to invoke restrictions or for NARA to accept restrictions on access placed by the FCIC. We understand this portion of your appeal to be alleging that NARA is holding out section 2108(a) as a “(b)(3)” withholding statute, as in your view section 2108(a) fails to meet the relevant FOIA test.

For the reasons stated below, I affirm NARA’s original denial of your FOIA request for FCIC records on the grounds that these are legislative branch records that are not subject to the FOIA.

NATIONAL ARCHIVES *and*  
RECORDS ADMINISTRATION

8601 ADELPHI ROAD  
COLLEGE PARK, MD 20740-6001  
[www.archives.gov](http://www.archives.gov)

Letter to Daniel Epstein, Page 2 of 5

A proper analysis of the legal issues raised by your FOIA appeal must begin with the factual circumstances regarding transfer of FCIC records into NARA's custody.

First, on February 10, 2011, contemporaneous with the imminent termination of the FCIC, the Chairman of the FCIC, Phil Angelides, wrote to the Archivist of the United States, David Ferriero, providing detailed instructions to "set forth the Commission's continued interest in government and public access to information created or gathered during its investigation," in which the Chairman "establishe[d] criteria under which these records should be made available." (See attached at Tab A.) As set out in the Chairman's letter, NARA is to make the FCIC's records available to the public "to the greatest extent possible consistent with the terms of this letter," beginning on February 13, 2016 (five years after the termination of the FCIC by statute). The letter also went on to detail specific instructions as to which records should not be disclosed after February 13, 2016, if they contain (a) personal privacy information; (b) confidential financial supervisory or regulatory information; (c) proprietary business information which remains confidential or contains trade secrets; or (d) information otherwise barred from disclosure as determined by the Archivist. The letter further states that "[b]ecause the Commission was established in the legislative branch, its records have not been subject to the Freedom of Information Act (FOIA), and we understand that the FOIA will not apply to Commission records even after they are transferred to NARA."

Second, accompanying the Chairman's letter was a signed Standard Form 258, "Agreement to Transfer Records to the National Archives of the United States," Accession No. NN3-148-11-001, signed and countersigned by representatives of the FCIC and NARA (attached at Tab B). The Agreement contains as Box 12 under "Records Information," in which in answer to the question "Are records fully available for public use," the corresponding box is checked "No." The Agreement also contains language striking out a reference to 5 U.S.C. 552 under "Terms of Agreement." Those terms go on to specify that the records are now the responsibility of the Archivist of the United States pursuant to 44 U.S.C. 2108 to continue to maintain, in fulfillment of the Archivist's obligations under the Federal Records Act.

As a matter of law, there is no question that the FCIC's records were exempt from the FOIA at the time of their creation. The FCIC was established by the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. 111-21, under the auspices of the Legislative branch. As such, the Commission's records were properly deemed "legislative branch records," excluded from FOIA, while in the possession of the FCIC during the entirety of the Commission's existence. See *United We Stand Am, Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004).

Letter to Daniel Epstein, Page 3 of 5

You cite to *Tax Analysts* for the proposition that material constituting an “agency record” must be in the possession and control of an executive branch agency that is subject to FOIA. However, under longstanding D.C. Circuit precedent, the matter of “control” is determined by analyzing the legislative branch’s intent contemporaneous with transfer of possession. In particular, under a line of authority starting with *Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978), *vacated in part on other grounds*, 607 F.2d 367 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), courts have seen fit to find that congressional-originated documents retain their status and are *not* considered to be “agency records” subject to FOIA, where the “conditions under which [the documents] were transferred to the agency” indicate that “Congress established ‘*contemporaneous* and *specific* instructions’ to the agency limiting either the use or disclosure of the documents.” *Center for National Security Studies v. CIA*, 577 F. Supp. 584, 588 (D.D.C. 1983) (quoting *Paisley v. CIA*, 712 F.2d 686, 692, 694 (D.C. Cir. 1983)), *vacated in part on other grounds*, 742 F.2d 201 (D.C. Cir. 1984) (emphasis in *Paisley*).

Here, based on the FCIC Chairman’s letter stating explicitly “that the FOIA will not apply to Commission records even after they are transferred to NARA,” NARA is on notice that the transfer evidenced legislative intent to maintain legislative control over the document’s confidentiality. *Accord, Goland*, 607 F.2d at 347 (court finding “Congressional intent to maintain Congressional control over the document[s] confidentiality”). As such, NARA does not consider that control has passed from the legislative branch sufficiently to establish that NARA has “free disposition,” *id.* at 348, to treat these legislative branch records as being subject to FOIA. *Id.* at 348.

In our view, the fact that the records in question have been transferred to NARA’s legal custody under the Federal Records Act is not otherwise dispositive of the FOIA access question. First, the D.C. Circuit has rejected the notion that “the treatment of documents for disposal and retention purposes under the various federal records management statutes determines their status under FOIA.” *Consumer Federation of America v. Dep’t of Agriculture*, 455 F.3d 283, 289 (D.C. Cir. 2006), *citing Bureau of Nat’l Affairs v. Dep’t of Justice*, 742 F.2d 1484, 1493 (D.C. Cir. 1984).

Second, courts have long recognized that there are types of archival records in NARA’s legal custody where access restrictions are controlled by the terms of other statutes or by donor intent. *See, e.g., Ricchio v. Kline*, 773 F.2d 1389 (D.C. Cir. 1985) (holding that access to Nixon materials in NARA’s custody were controlled by the Presidential Materials and Preservation Act (PRMPA), 44 U.S.C. 2111 note, and not by FOIA). For example, NARA’s older Presidential Libraries hold vast collections of Presidential materials created prior to the Presidential Records Act, 44 U.S.C. 2201, and to the PRMPA, that were owned originally by

Letter to Daniel Epstein, Page 4 of 5

the former Presidents and then donated to NARA under a deed of gift. There has never been a challenge that these presidential materials, transferred under donor agreements, are to be considered “agency records” subject to FOIA, and the mere fact that NARA is in possession of such records does not convert their status wholesale to such “agency records.”

With respect to your secondary argument on appeal, we believe NARA’s organic statute at 44 U.S.C. 2108(a) does, in fact, buttress our position that the Archivist of the United States has the authority to uphold and respect FCIC’s instructions with regard to imposing restrictions on future access to what were legislative branch records in FCIC’s custody.

[W]hen the head of a Federal agency states, in writing, restrictions that appear to him to be necessary or desirable in the public interest with respect to the use or examination of records being considered for transfer from his custody to the Archivist, the Archivist shall, if he concurs, impose such restrictions on the records so transferred . . . . In the event that a Federal agency is terminated and there is no successor in function, the Archivist is authorized to relax, remove, or impose restrictions on such agency’s records when he determines that such action is in the public interest.

Contrary to what you assert in your appeal letter, the FCIC is a “Federal agency” within the meaning of the Federal Records Act, 44 U.S.C. 2901(14) (the term includes establishments in the executive, legislative and judicial branches, with exceptions). This definition in the FRA of “Federal agency” differs significantly from the FOIA definition of “agency,” 5 U.S.C. 552(F)(1), which is limited only to executive branch entities. Thus, the Archivist may act pursuant to section 2108 to uphold restrictions placed by a federal agency from the legislative branch. While in our view the FCIC could have imposed a stricter nondisclosure regime on its legislative branch records that were transferred to NARA under the FRA, section 2108 provides a statutory mechanism for the Archivist to accept *lesser* restrictions on access, such as FCIC’s stated intent that its non-public records be disclosed in five years subject to conditions that would appear to be consistent with the FOIA. Your further references to section 2108 not meeting the requirements of an Exemption 3 statute under the FOIA, 5 U.S.C. 552(b)(3), are inapposite, as Exemption 3 comes into play only where “agency records” are at issue, which is not the case here.

Letter to Daniel Epstein, Page 5 of 5

This exhausts your administrative remedies. Judicial review is available to you in the United States District Court for the judicial district in which you reside, in the District of Columbia, which is where the records reside.

Sincerely,

A handwritten signature in blue ink that reads "Debra Steidel Wall". The signature is written in a cursive style with a large initial "D".

DEBRA STEIDEL WALL  
Deputy Archivist of the United States

Enclosures

**Tab A**



February 10, 2011



The Honorable David Ferriero  
Archivist of the United States  
National Archives and Records Administration  
8601 Adelphi Road  
College Park, MD 20740

Dear Mr. Ferriero:

Phil Angelides  
*Chairman*

Hon. Bill Thomas  
*Vice Chairman*

Brooksley Born  
*Commissioner*

Byron S. Georgiou  
*Commissioner*

Senator Bob Graham  
*Commissioner*

Keith Hennessey  
*Commissioner*

Douglas Holtz-Eakin  
*Commissioner*

Heather H. Murren, CFA  
*Commissioner*

John W. Thompson  
*Commissioner*

Peter Wallison  
*Commissioner*

Wendy Edelberg  
*Executive Director*

When the Financial Crisis Inquiry Commission (the "Commission") terminates, by statute, on February 13, 2011, the records of the Commission will be transferred to the National Archives and Records Administration (NARA) for preservation and public access. This letter sets forth the Commission's continued interest in government and public access to information created or gathered during its investigation and establishes criteria under which these records should be made available.

The Commission has established a policy of making available to the public as much information as possible, while safeguarding personal privacy, law enforcement, private commercial, financial regulatory, and other sensitive information. The Commission's final report is highly detailed and discloses a significant amount of previously unavailable material. In addition, the Commission has released through its website many supplemental documents, including staff memoranda, documentary evidence, e-mails, witness statements, interviews, transcripts and summaries, audio and video files, and press releases. All of the records and information that the Commission has made available to the public should continue to be made publicly available by NARA. This includes the records that are accessible on the Commission's website, which NARA will maintain after February 13, 2011, and on the Commission's parallel website which the Commission will establish at Stanford University. Because the Commission was established in the legislative branch, its records have not been subject to the Freedom of Information Act (FOIA), and we understand that the FOIA will not apply to Commission records even after they are transferred to NARA.

The Commission recommends to NARA that records not already publicly available should be made available to the public, to the greatest extent possible consistent with the terms of this letter, beginning on February 13, 2016. The Commission encourages NARA to conduct a systematic review of the records that are not currently available to the public with the goal of releasing to the public as much information as is allowable by law and regulation on February 13, 2016, or as soon thereafter as possible. Records should not be disclosed immediately after February 13, 2016, if they contain (a) personal privacy information that the Commission agreed to protect from public disclosure for longer than 5 years; (b) confidential financial supervisory or regulatory information which remains sensitive at the time of release; (c) proprietary business information which remains confidential or contains trade secrets at the time of release, including any such information that the Commission has agreed will remain confidential for a longer period of time; or (d) information which is otherwise barred from public disclosure by law, as determined by the Archivist.

We understand that there will be an initial period of at least several months during which NARA's staff will be organizing and processing the Commission's records. During this period, access to the records should be provided to the ten members of the Commission (Phil Angelides, the Honorable Bill Thomas, Brooksley Born, Byron S. Georgiou, Senator Bob Graham, Keith Hennessey, Douglas Holtz-Eakin, Heather H. Murren, John W. Thompson and Peter J. Wallison) and the following members of the Commission staff and advisors: Wendy Edelberg, Peter Kadzik, Esq., Gretchen Newsom, Scott Ganz, Gary Cohen, Greg Feldberg, Chris Seefer, Maryann Haggerty, and Cassidy Waskowicz. In addition, certain administrative staff of the Commission may have access as part of their duties to transfer the records to NARA. During the period when the FCIC transfers records to NARA and after February 13, 2011, it is important that the ten Commissioners and the designated members of the Commission staff and advisors have continuing access to the Commission's records once the records are transferred to NARA.

Thank you for your cooperation in carrying out the important task of preserving and providing access to the Commission's voluminous records.

Very truly yours,

  
Phil Angelides  
Chairman

Financial Crisis Inquiry Commission

Cc: Members, Financial Crisis Inquiry Commission  
Gary M. Stern, NARA  
Wendy Edelberg, Executive Director  
Cassidy Waskowicz, Deputy General Counsel

**Tab B**

# AGREEMENT TO TRANSFER RECORDS TO THE NATIONAL ARCHIVES OF THE UNITED STATES

1. INTERIM CONTROL NO. (NARA Use Only)

## TERMS OF AGREEMENT

The records described below and on the attached pages are deposited in the National Archives of the United States in accordance with 44 U.S.C. 2107. ~~The transferring agency certifies that any restrictions on the use of these records are in conformance with the requirements of 5 U.S.C. 552.~~

In accordance with 44 U.S.C. 2108, custody of these records becomes the responsibility of the Archivist of the United States at the time of transfer of the records. It is agreed that these records will be administered in accordance with the provisions of 44 U.S.C. Chapter 21, 36 CFR XII, 36 CFR Part 1256, and such other rules and regulations as may be prescribed by the Archivist of the United States (The Archivist). Unless specified and justified below, no restrictions of the use of these records will be imposed other than the general and specific:

restrictions on the use of these records will be imposed other than the general and specific restrictions on the use of records in the National Archives of the United States that have been published in 36 CFR Part 1256 or in the Guide to the National Archives of the United States. The Archivist may destroy, donate, or otherwise dispose of any containers, duplicate copies, unused forms, blank stationery, nonarchival printed or processed material, or other non-record material in any manner authorized by law or regulation. Without further consent, the Archivist may destroy deteriorating or damaged documents after they have copied in a form that retains all of the information in the original document. The Archivist will use the General Records Schedule and any applicable records disposition schedule (SF 115) of the transferring agency to dispose of nonarchival materials contained in this deposit.

### 2A. AGENCY APPROVAL

Signature [Signature] Date 2/11/11

### 3A. NARA APPROVAL

Signature [Signature] Date 2/8/2011

### 2B. NAME, TITLE, MAILING ADDRESS

Sarah Zuckerman  
Financial Crisis Inquiry Commission  
1717 Pennsylvania Ave, NW  
Washington, DC 20006

### 3B. NAME, TITLE, MAILING ADDRESS

Matt Fulgham  
Assistant Director, Center for Legislative Archives (NARA)  
700 Pennsylvania Ave, NW  
Washington, DC 20408

## RECORDS INFORMATION

4A. RECORDS SERIES TITLE Records of the Financial Crisis Inquiry Commission

4B. DATE SPAN OF SERIES 2009-2011 (Attach any additional description)

### 5A. AGENCY OR ESTABLISHMENT

Legislative branch commission

### 5B. AGENCY MAJOR SUBDIVISION

### 5C. AGENCY MINOR SUBDIVISION

### 5D. UNIT THAT CREATED RECORDS

### 5E. AGENCY PERSON WITH WHOM TO CONFER ABOUT THE RECORDS

Name: Sarah Zuckerman  
Telephone Number: 202-292-1388

### 6. DISPOSITION AUTHORITY

pending records schedule (NN1-148- )

### 7. IS SECURITY CLASSIFIED INFORMATION PRESENT? ☒ NO ☐ YES

LEVEL: ☐ Confidential ☐ Secret ☐ Top Secret

SPECIAL MARKINGS: ☐ (R) (U) ☐ SCI ☐ NATO

INFORMATION STATUS: ☐ Other ☐ Segregated ☐ Declassified

### 8. CURRENT LOCATION OF RECORDS

☒ Agency (Complete 8A only)  
☐ Federal Records Center (Complete 8B only)

### 8A. ADDRESS:

1717 Pennsylvania Ave, NW  
Washington, DC 20006

### 9. PHYSICAL FORMS

☒ Paper Documents ☐ Posters  
☒ Paper Publications ☐ Maps and Charts  
☐ Microfilm/Microfiche ☐ Archiving Drawings  
☒ Electronic Records ☐ Motion/Sound/Video  
☐ Photographs ☐ Other (specify):

### 10. VOLUME CONTAINERS:

Cu. Ft.: 243 Number: 243 Type: FRC

### 11. DATE RECORDS ELIGIBLE FOR TRANSFER TO THE ARCHIVES

Feb. 2011

### 12. ARE RECORDS FULLY AVAILABLE FOR PUBLIC USE?

☐ YES ☒ NO (If no, attach limits on use and justification)

### 13. ARE RECORDS SUBJECT TO THE PRIVACY ACT?

☐ YES ☒ NO (If yes, cite Agency System Number and Federal Register volume and page number of most recent notice and attach a copy of this notice.)

### 14. ATTACHMENTS

☐ Agency Manual Excerpt ☐ Listing of Records Transferred  
☐ Additional Description ☐ NA Form 14097 or Equivalent  
☐ Privacy Act Notice ☐ Microform Inspection Report  
☒ Other (specify): Access letter ☐ SF(s) 135

### 8B. FRC ACCESSION NUMBER

### CONTAINER NUMBERS

### FRC LOCATION

## NARA PROVIDES

### 5. SHIPPING INSTRUCTIONS TO AGENCIES/REMARKS REGARDING DISPOSITION

RG 148

### 6. RECORDS ACCEPTED INTO THE NATIONAL ARCHIVES OF THE UNITED STATES

Signature [Signature] Date 2/11/11

### 17. NATIONAL ARCHIVES ACCESSION NO.

NAV3-148-11-001

# EXHIBIT

8



April 18, 2012

Peter J. Wallison  
1880 Lazy O Road  
Snowmass, Colorado 81654  
[Pwallison@aol.com](mailto:Pwallison@aol.com)

By Email

Dear Mr. Wallison:

In your letter of April 5, 2012, you have asked for NARA's policy on providing access to former government officials, such as yourself, to the records of the Financial Crisis Inquiry Commission on which you served that are now permanently preserved in the National Archives.

As we discussed on the phone, non-governmental officials presumptively have no right of access to non-public information that is maintained by the National Archives (or any other government agency). Access to records in the National Archives is controlled by applicable statutory requirements found in such statutes as the Freedom of Information Act, the Privacy Act, the Federal Records Act, and the Presidential Records. Our policies on access can be found in our corresponding regulations, at 36 C.F.R. Part 1202 (Privacy Act); Part 1250 (FOIA); Part 1256 (Federal Records); Part 1270 (Presidential Records); Part 1275 (Nixon Presidential Materials).

Only in the past few years have members of commissions requested that the Archivist of the United States allow for continued access by former commissioners and their senior staff. The request was premised on the limited need to prepare for possible subsequent congressional hearings or queries on the work of the commission. There is no statutory or regulatory requirement that the Archivist grant this request. However, the Archivist has determined that it is reasonable to grant former Commissioners and their senior staff continued access to the records of the Commission for the limited purpose described above. This discretionary access is limited to the persons named in the request letter from the former Chairman of the Commission, and thus does not extend to other persons, including representatives of the named persons.

We are making arrangements to facilitate your access to the commission records that you have requested, if you would still like to come. The records will be available on a computer in a

NATIONAL ARCHIVES *and*  
RECORDS ADMINISTRATION  
8601 ADELPHI ROAD  
COLLEGE PARK MD 20740-6001  
[www.archives.gov](http://www.archives.gov)

GARY M. STERN  
GENERAL COUNSEL  
SUITE 3110  
T 301 837 3026  
[garym.stern@nara.gov](mailto:garym.stern@nara.gov)

secure research room at our Main Archives Building 700 Pennsylvania Avenue, NW, in Washington, DC, during regular business hours.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary M. Stern", with a long, sweeping horizontal stroke extending to the right.

GARY M. STERN  
General Counsel